No. 390 5

In the Supreme Court of the United States

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UNITED STATES OF AMERICA, PETITIONER

v.

HARVEY L. CARIGNAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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v.

HARVEY L. CARIGNAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit reversing respondent's conviction of murder in an attempt to commit rape.

OPINIONS BELOW

The opinions in the Court of Appeals (R. 283-298) are not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered December 8, 1950 (R. 299). On January 3,

1951, the time within which to file this petition for a writ of certiorari was extended by order of Mr. Justice Douglas to and including February 6, 1951 (R. 299). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

Whether respondent's written and oral admissions that he assaulted the deceased, which he made voluntarily while being lawfully detained after having been duly arraigned and committed on another charge (i.e., assault with intent to rape another woman); were inadmissible under the rule of *McNabb* v. *United States,* 318 U.S. 332, merely because at the time of such admissions he had not been arraigned on the murder charge.

STATUTES AND RULE INVOLVED

Alaska Compiled Laws Annotated, 1949:

> Sec. 65-4-1. *First degree murder.* That whoever, being of sound memory and discretion, purposely, and either of deliberate and premeditated malice or by means of poison, or in perpetrating or in attempting to perpetrate, any rape, arson, robbery, or burglary, kills another, is guilty of murder in the first degree, and shall suffer death.
>
> Sec. 65-4-2. * * * That in all cases where the accused is found guilty of the crime of murder under this and the next preceding section, the jury may qualify their verdict by ad-

ding thereto "without capital punishment"; and whenever the jury shall return a verdict qualified as aforesaid the person convicted shall be sentenced to imprisonment at hard labor for life.

Rule 5, Federal Rules of Criminal Procedure:

(a) *Appearance Before the Commissioner.* An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith.

(b) *Statement by the Commissioner.* The commissioner shall inform the defendant of the complaint against him, of his right to retain counsel and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The commissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules.

STATEMENT

Respondent was charged in the District Court for the Territory of Alaska, Third Division, with

killing Laura A. Showalter in attempting to rape her (R. 1) and upon his conviction, the jury having returned an unqualified verdict (R. 29-30, 282), he was sentenced to death (R. 32-34).

The evidence showed that at about nine o'clock on the evening of July 31, 1949, in Anchorage, Alaska, one Keith, while on his way home, noticed a man and a woman lying in tall grass at the side of the road. As Keith passed by, while the woman lay motionless, the man arose and ordered him to go on. (R. 117-118, 125, 127.) His suspicions aroused, upon passing this location the next morning, Keith discovered the body of a semi-nude woman and informed the police (R. 120, 129). Upon investigation, the police learned that the victim was Mrs. Showalter and that a number of the personal effects found near the body were hers (R. 143, 155-156, 159, 169). A hat discovered at the scene was later identified as identical with one worn by respondent on the night of the murder (R. 133, 136, 205, 207).

On the morning of Friday, September 16, 1949, the Anchorage police called George Peterson, an agent of the Criminal Investigation Division, United States Army, at Fort Richardson, near Anchorage (R. 185), and advised him that they wanted to speak to respondent and another soldier stationed at the fort. Respondent accompanied Peterson to the Anchorage police station, arriving there about 11:00 a.m. He was placed in a line-up with four other men and was identified by Mrs.

Christine Norton, who was the victim of an assault on the night of September 14. (R. 186, 195.) After questioning as to his activities that night, respondent "confessed to the assault on Mrs. Norton" (R. 195; see also R. 176-177).

While awaiting an answer to Peterson's call to the Staff Judge Advocate at Fort Richardson to find out whether respondent could be released to the civilian authorities for prosecution on the Norton assault charge (R. 195), respondent was questioned briefly concerning the Showalter murder, but he denied that he knew anything about it (R. 159-160, 170-171). About noon Keith was brought to the police station (R. 160-161) and he identified respondent in a line-up [1] as resembling the man he saw lying in the grass with a woman on the night of July 31 (R. 120, 130). Respondent refused to tell the police anything about his activities on July 31, but asked to talk to Peterson alone (R. 195-196). He asked Peterson what he should do and whether Peterson could help him. Peterson told him that he could not be compelled to make a statement, and that he, Peterson, "had nothing to go on, and if he wanted my help he had to give me a story of what his activities were". (R. 192; see also R. 187, 195-196.) Respondent then told Peterson of some of his activities on July 31 and described the clothes he wore that day (R. 187, 191-192).

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[1] It is not clear from the record whether this was the same line-up Mrs. Norton viewed.

During all this period, respondent was not under arrest (R. 174-176, 186, 193). After the interrogation he was asked to wait in the lobby of the police station. Two or three hours later, at approximately 4:00 p.m. on September 16, a United States Deputy Marshal appeared with a warrant for his arrest on the Norton assault charge. (R. 174, 175, 176.) He was immediately arraigned before the Commissioner on that charge (R. 174, 232), advised of his constitutional rights, and committed (R. 44). He was detained in the city jail in the police station because there was no room for him in the Marshal's jail (R. 175).

The next morning, Saturday, September 17, the local police advised Herring, the United States Marshal, of respondent's arrest and the similarity of the attacks upon Mrs. Showalter and Mrs. Norton, and it was decided that Herring should question respondent "in an endeavor to get a statement from him as to whether or not he had anything to do with the Showalter case" (R. 223). About noon Herring took respondent from the jail, treated him to lunch at a restaurant, and then took him to Herring's office in the courthouse (R. 224-225). At the outset, Herring told respondent "he did not have to make a statement at this time, that anything he said could be used against him, and that he was entitled to counsel if he so desired" (R. 224). After telling Herring about his background, respondent "expressed a fear of his neck stretch-

ing" if he made a statement. Herring told him that "it was something I couldn't tell him, promise him, one way or the other as to what was going to happen to his neck, that it was entirely a matter for the jury." (R. 225.) Respondent asked to see a priest, and Herring found one after an hour's hunt. After talking to the priest alone for about an hour, respondent told Herring he would give him a statement. Herring furnished respondent with paper and pencils and returned him to the city jail, leaving instructions that he was not to be disturbed. (R. 220, 225-227.) When Herring left respondent, the former told him "that after he had written the statement, if he did not care to give it to me he could tear it up and flush it down the toilet" (R. 220).

The next day, Sunday, Herring visited respondent briefly at the jail "to see how he was getting along, to see if he needed any cigarettes," but did not question him (R. 227-228).

Monday morning, September 19, Herring took respondent to the grand jury room in the courthouse, and asked respondent if he had a statement he wished to give him. Respondent said he had a statement, but that he wished to see the priest first. He again talked to the priest alone for about an hour, and then gave Herring the statement he had prepared, adding, however, that there was "nothing in it." (R. 220, 228-229.) At that time the statement recounted respondent's activities on July 31 only until he left a bar at about 9:00 p.m.

Respondent told Herring he was "afraid to put the rest of it down for fear that he wouldn't be believed, and for fear that his neck would stretch." (R. 220-221.) After five or ten minutes' further conversation with Herring, respondent completed the statement (R. 221), admitting that after he left the bar he accosted a woman on the street and hit her in the face and that, although he was drunk at the time, he remembered "sitting and hitting a woman in the face with my fists" (R. 235). Herring told respondent that he "could still destroy [the statement] if he wished" (R. 221). Herring testified further that no promises of any kind were made to respondent and that he was never threatened, but, on the contrary, "was treated with the utmost courtesy at all times, as if a guest in my own home" (*ibid.*).

When the prosecution offered respondent's written statement in evidence, respondent's counsel requested and was granted permission to cross-examine Herring before the jury "to determine [its] admissibility" (R. 221-222). In the course of this examination, Herring stated that when respondent expressed fear "that his neck would stretch, * * * I told him that I could not promise him anything, and I told him in the time I had been in this division for twenty-seven years that there had been no hanging, what would happen to him I couldn't promise him or anyone else" (R. 230). Herring had pictures of Christ and various saints on the walls of his

office. He said that in his talk with respondent in the office he showed him the picture of Christ, and asked "what he thought his Maker would think about him" and suggested "that his Maker might think more of him if he told the truth about this" (R. 230-231). He also said that respondent asked him what kind of a place McNeil Island Penitentiary was, and that he told respondent he "had known men that had been there and learned a trade and that made something of their lives, and it may be that I told him of one specific instance of a man that learned a boat-building trade there" (R. 231).

Following this cross-examination, the court overruled respondent's objection to the admission of his statement on the ground that it was the result of promises and inducements, and it was read to the jury (R. 232-235).[2] Thereafter, Herring testified that immediately after respondent had given him the written statement on September 19, respondent demonstrated how he had held Mrs. Showalter, identified a picture of Mrs. Showalter as resembling the woman he attacked on July 31 (R. 250-251), identified as his the man's hat found at the scene of

[2] Prior to the admission of the statement, respondent's counsel also requested that the jury be excused and that respondent be allowed to testify "on the taking of this statement." The court denied the motion, stating that it had "heard enough evidence on this matter." (R. 232.) The denial of this request was assigned as error on respondent's appeal (R. 283), but in view of the Court of Appeals' holding that respondent's admissions were erroneously admitted in evidence, it thought there was "no occasion now to rule upon" this assignment (R. 289).

the crime (R. 235), described the clothes he wore at that time, and went with Herring and other officers to the scene and pointed out to them the place he attacked Mrs. Showalter and the route he took back to the fort (R. 236-237; see also R. 161-162, 179, 183-184).

The Court of Appeals, one judge dissenting, reversed respondent's conviction on the ground that his written and oral admissions were inadmissible under the rule of *McNabb* v. *United States*, 318 U.S. 332.

Although Judge Healy, one of the majority, thought that "something approaching psychological pressure, not unmixed with deceit, contributed to the extraction of the confession" (R. 288, fn.), Judge Bone, concurring, and Judge Pope, dissenting, agreed that respondent's admissions were entirely voluntary (R. 290-292, 294, 296), with the result that Judge Healy's view in this regard was not "given weight in the decision to reverse" (R. 288, fn.).

Judge Bone, concurring, expressed his "personal conviction that simple justice in this case would be served by affirmance of the judgment" (R. 289); that since respondent was "fully advised as to *all* of his legal rights" when he was arraigned upon the Norton assault charge, and again by Herring at the outset of the questioning on the Showalter killing, respondent did not "require the services of an attorney to know that he did not have

to 'talk' "; and that respondent's confession, coming as it did after two conferences with a priest, the second of which immediately preceded the confession, was the product of his "sense of guilt" and not the result of anything Herring said to him (R. 290-292, 294). Nevertheless, although he decried "the appalling possibility that a brutal murderer who had reached the maturity of manhood and who fully understood the nature of his horrible crime, may possibly escape punishment because of the suppression of this confession" (R. 295), Judge Bone felt constrained to hold (R. 292-294) that its admissibility under the *McNabb* and *Upshaw* doctrine turned upon its timing and not upon its truth and voluntary character (R. 293), and that in view of "the failure of the officers to have Carignan arraigned within the period indicated in Rule 5(a)(b) *before quizzing him in any manner* about his possible connection with the murder of Laura Showalter," the confession was "automatically" inadmissible (R. 292). He emphasized that his "concurrence rests *solely* upon the fact that [respondent] was not arraigned prior to being interrogated by the Marshal and prior to the making of the confession" (R. 294). Since there is nothing in Judge Bone's opinion indicating that he thought respondent's detention on the Norton assault charge was illegal under Rule 5, he held, in effect, that under the *McNabb* rule a voluntary confession of one crime, made after questioning a person who has been duly arraigned, fully advised of his rights,

and committed on a charge of another crime, is inadmissible unless he was, before the questioning, also arraigned for the crime to which he confessed.

Judge Pope pointed out in his dissenting opinion (R. 295-298) that at the time of his confession respondent "was being lawfully held after commitment upon a charge of attempted rape" upon Mrs. Norton (R. 296). Since, therefore, there was no illegal detention, he thought that the majority had extended the doctrine of the *Upshaw* case "beyond its intended or proper boundaries" (R. 295); that the decision "comes pretty close to holding that a confession cannot be taken in the absence of the accused's lawyer" (R. 296); and that "if there is to be any such drastic departure from previous notions as to the law, it should be accomplished by Congress, rather than by the courts" (R. 297).

SPECIFICATION OF ERROR TO BE URGED

The Court of Appeals erred in holding that respondent's written and oral admissions were inadmissible under the rule of *McNabb* v. *United States*, 318 U.S. 332, and *Upshaw* v. *United States*, 335 U.S. 410, and in reversing his conviction on that ground.

REASONS FOR GRANTING THE WRIT

Nothing in the *McNabb* and *Upshaw* decisions requires or justifies the holding below that respondent's concededly voluntary admissions were inadmissible under the rule, as stated in the *Upshaw* case, "that a confession is inadmissible if made

during illegal detention due to failure promptly to carry a prisoner before a committing magistrate, whether or not the 'confession is the result of torture, physical of psychological. . . . .'" (335 U.S. at 413). Here, as shown in the Statement, *supra*, pp. 5-6, respondent was promptly arraigned before the Commissioner on the Norton assault charge, fully advised of his rights to remain silent and to have counsel (see Rule 5(b), F.R. Crim. P., *supra*, p. 3, and R. 44), and duly committed. His later confession, after he had again been advised of these rights by Marshal Herring, that he attacked and beat Mrs. Showalter was thus made while he was lawfully held in the Marshal's custody.

The *McNabb* rule does not come into play unless the confession occurred during an illegal detention. Since respondent's detention during the period in which he confessed was entirely lawful, the *sine qua non* for applying the *McNabb* rule is absent in this case. That rule, which is not based upon constitutional considerations, is a rule of evidence enunciated by this Court in "the exercise of its supervisory authority over the administration of criminal justice in the federal courts" (318 U.S. at 340-341; see also *United States* v. *Mitchell*, 322 U.S. 65, 66, 68) to implement the policy of legislation (now embodied in Rule 5) requiring the prompt arraignment before a magistrate of a person arrested for crime (318 U.S. at 344-347). In this case, none of

the considerations which led to the promulgation of the *McNabb* rule is present. Legal cause for detaining respondent was promptly shown (see 318 U.S. at 344). Herring did not assume "functions which Congress has explicitly denied" him (*id.*, pp. 341-342). He did not subject respondent "to the pressures of a procedure [detention without arraignment] which is wholly incompatible with the vital but very restricted duties of the investigating and arresting officers of the Government" (*id.*, p. 342), for, in obedience to the mandate of Rule 5, respondent had been promptly arraigned and committed. There was no "misuse of the law enforcement process" (*id.*, p. 343), for there is no prohibition, other than the self-incrimination clause of the Fifth Amendment, against questioning a person lawfully detained in custody. "The mere fact that a confession was made while in the custody of the police does not render it inadmissible" (*id.*, p. 346; reiterated in *United States* v. *Mitchell*, 322 U.S. at 69).[3]

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[3] See also the comment of the Advisory Committee on the Rules of Criminal Procedure on the Committee's proposed rule 5(b) in the Preliminary Draft of the rules, providing that "No statement made by a defendant in response to interrogation by an officer or agent of the government shall be admissible in evidence against him if the interrogation occurs while the defendant is held in custody in violation of this rule" (p. 11). The committee stated in its note to this proposed rule: "It is to be noted that the proposed rule does not exclude voluntary statements made in response to interrogation by officers unless at the time the statement is made the detention is unlawful under Subdivision (a); * * *" (p. 13). The proposed rule was eliminated from subsequent drafts of the rules.

In short, as in the *Mitchell* case, where this Court sustained the admissibility of a confession made shortly after the defendant's arrest and before any illegal detention had occurred, "the foundations for application of the *McNabb* doctrine are here totally lacking" (322 U.S. at 69). As in that case, "there was no disclosure induced by illegal detention, no evidence was obtained in violation of any legal rights" (*id.*, p. 70). Indeed, this case is *a fortiori* from *Mitchell*, since here there was never any illegal detention.

We submit, therefore, that the dissenting judge below was right in his view that the majority's decision constitutes an unwarranted misapplication of the *McNabb* rule. The question thus presented as to the proper application of that rule is an important one in the administration of federal criminal justice which only this Court can authoritatively resolve. Cf. *United States* v. *Mitchell*, 322 U.S. at 66.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

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